EXHIBIT 23

Groklaw

*When you want to know more
but don't know where to look.*

IBM Seeks Declaratory Judgment of Noninfringement
Tuesday, March 30 2004 @ 06:45 PM EST

I will have the actual documents available shortly, but **News.com** is reporting that IBM is seeking a declaratory judgment. This means IBM believes SCO's case is so weak on this copyright infringement claim that they can toss it overboard:

> *"The filing in U.S. District Court in Salt Lake City includes a new counterclaim in which IBM seeks a declaratory judgment ruling that "IBM does not infringe, induce the infringement of or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in Unix are invalid and unenforceable."*

UPDATE: Here's the proposed Amended Counterclaims from IBM, and here is the unopposed Motion to Amend.

Here are the new counterclaims regarding noninfringement of copyrights:

NINTH COUNTERCLAIM

Declaratory Judgment of Noninfringement of Copyrights

162. IBM repeats and realleges the averments in paragraphs 1 through 161, with the same force and effect as though they were set forth fully herein.

163. SCO purports to hold copyrights relating to UNIX software, including the following copyrights:

- *Registration No.: TXU-510-028 -- Date of Registration: March 25, 1992 -- Title of Work: UNIX Operating System Edition 5 and Instruction Manual*
- *Registration No.: TXU-511-236 -- Date of Registration: April 7, 1992 -- Title of Work: UNIX Operating System Edition 6 and Instruction Manual*
- *Registration No.: TXU-516-704 -- Date of Registration: May 15, 1992 -- Title of Work: UNIX Operating System Edition 32V and Instruction Manual*
- *Registration No.: TXU-516-705 -- Date of Registration: May 15, 1992 -- Title of Work: UNIX Operating System Edition 7 and Instruction Manual*
- *Registration No.: TXU-301-868 -- Date of Registration: November 25, 1987 -- Title of Work: Operating System Utility Programs*
- *Registration No.: TX5-787-679 -- Date of Registration: June 11, 2003 -- Title of Work: UNIXWARE 7.1.3*
- *Registration No.: TX5-750-270 -- Date of Registration: July 7, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 3.0*
- *Registration No.: TX5-750-269 -- Date of Registration: July 7, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 3.1*
- *Registration No.: TX5-750-271 -- Date of Registration: July 7, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 3.2*
- *Registration No.: TX5-776-217 -- Date of Registration: July 16, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 4.0*
- *Registration No.: TX5-705-356 -- Date of Registration: June 30, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 4.1ES*
- *Registration No.: TX5-762-235 -- Date of Registration: July 3, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 4.2*
- *Registration No.: TX5-762-234 -- Date of Registration: July 3, 2003 -- Title of Work: UNIX SYSTEM V RELEASE 4.1*
- *Registration No.: TX5-750-268 -- Date of Registration: July 9, 2003 -- Title*
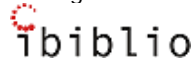
of Work: UNIX SYSTEM V RELEASE 3.2

164. SCO has sued IBM claiming that IBM has infringed, induced the infringement of, and contributed to the infringement of SCO's purported UNIX copyrights by, among other things, continuing to "reproduce, prepare derivative works of, and distribute" copyrighted UNIX materials through its activities relating to AIX and Dynix.

165. IBM does not believe that its activities relating to AIX and Dynix, including any reproduction, improvement and distribution of AIX and Dynix, infringe, induce the infringement of, or contribute to the infringement of valid, enforceable copyrights owned by SCO.

166. An actual controversy exists between SCO and IBM as to the noninfringement of SCO's copyrights and the validity of any purported SCO copyrights concerning UNIX.

167. IBM is entitled to a declaratory judgment pursuant to 28 U.S.C. Section 2201 that IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through the reproduction, improvement, and distribution of AIX and Dynix, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable.

TENTH COUNTERCLAIM

Declaratory Judgment of Noninfringement of Copyrights

168. IBM repeats and realleges the averments in paragraphs 1 through 167, with the same force and effect as though they were set forth fully herein.

169. As discussed above, SCO purports to hold copyrights relating to UNIX software.

170. SCO has sued IBM claiming that IBM has infringed, induced the infringement of, and contributed to the infringement of, SCO's purported UNIX copyrights by, among other things, continuing to "reproduce, prepare derivative works of, and distribute" copyrighted UNIX materials through its activities relating to Linux.

171. IBM does not believe that its activities relating to Linux, including any use, reproduction and improvement of Linux, infringe, induce the infringement of, or contribute to the infringement of valid, enforceable copyrights owned by SCO.

172. An actual controversy exists between SCO and IBM as to the noninfringement of SCO's copyrights and the validity of any purported SCO copyrights concerning UNIX.

173. IBM is entitled to a declaratory judgment pursuant to 28 U.S.C. Section 2201 that IBM does not infringe, induce the infringement of, or contribute to the infringement of any Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and uneneforcable.

There are other changes too, enlarging their patent infringement claims: In the first patent counterclaim, originally it read like this, in paragraph 129 in the old pleadings:

"129. Upon information and belief, SCO has been and is infringing the '746 Patent within this judicial district and elsewhere by making, using, selling and/or offering to sell products, including UnixWare and Open Server, that practice one or more claims of the '746 Patent and therefore infringe that patent to the extent such infringing acts have occurred or occur during the effective period of that patent. "

Now it reads in paragraph 176 of the new:

> *"Upon information and belief, SCO has infringed , contributorily infringed, and/or actively induced others to infringe the '746 Patent within this judicial district and elsewhere in violation of 35 U.S.C. Section 271 by, without authority or license from IBM, (a) making, using, selling and/or offering to sell products, including UnixWare and Open Server, that practice one or more claims of the '746 Patent and (b) actively, knowingly and intentionally causing and assisting others to infringe one or more claims of the '746 Patent."*

You find the same expansion in 12th patent infringement claim, in paragraph 182, and in the 13th patent infringement claim, paragraph 188, to include not just infringement, but contributory infringement and/or that SCO actively induced others to infringe. They also drop one patent infringement claim, the one regarding the '211 Patent, which was the 10th counterclaim in the prior counterclaims, beginning at paragraph 133, regarding "Method of Navigating Among Program Menus Using a Graphical Menu Tree."

The Prayer for relief section has been adjusted to reflect the new counterclaims, and the test in red is the new text:

> *"(e) granting IBM declaratory relief, including a declaration that (i) that IBM does not, through its reproduction, improvement, and distribution of AIX and Dynix, infringe, induce the infringement of, or contribute to the infringement of any valid and enforceable copyright owned by SCO; (ii) that IBM does not, through its Linux activities, including its use, reproduction and improvement of Linux, infringe, induce the infringement of, or contribute to the infringement of any valid and enforceable copyright owned by SCO; (iii) SCO has violated IBM's rights as outlined above by breaching its contractual obligations to IBM, violating the Lanham Act, engaging in unfair competition, interfering with IBM's prospective economic relations, engaging in unfair and deceptive trade practices, breaching the GPL, infringing IBM copyrights and infringing IBM patents; (ii) SCO has no right to assert, and is estopped from asserting, proprietary rights over programs that SCO distributed under the GPL except as permitted by the GPL; and is not entitled to impose restrictions on the copying, modifying or distributing of programs distributed by it under the GPL except as set out in the GPL; and (iii) any product into which SCO has incorporated code licensed pursuant to the GPL is subject to the GPL and SCO may not assert rights with respect to that code except as provided by the GPL."*

You can compare with the **prior IBM counterclaims**. Here's **a tutorial** on declaratory judgments. And **here** is the Declaratory Judgment Act, 28 U.S.C. §§2201 -02. Remember that this Act is an enabling act. The judge has discretion to entertain a declaratory judgment request or not.

What does it mean? It means that IBM is totally confident that there is no infringing UNIX code in any of their contributions to Linux and that they believe they can prove it now.

UPDATE: I have been reading the document itself now, and there isn't anything new on the GPL front. They asked for a declaratory judgment regarding the GPL in their earlier counterclaims. IBM is challenging SCO's copyrights. That seems to mean that they are defining this as a true copyright fight, not a contract dispute, something SCO has avoided so far. SCO will have to prove they own these copyrights now, no matter what the judge rules on SCO's Motion to Remand in the Novell matter. And they will have to show the code they claim is infringing and prove they hold copyright ownership of that code and that the copyrights they hold relate to the allegedly infringing code. Considering that they have **publicly admitted** that they don't own the copyrights to the allegedly infringing code, it will be interesting to see how they answer this.

The other interesting piece is this: SCO from the beginning has spoken of their reliance on a jury being able to see their point of view. There have been SCO supporters saying that a Utah jury would be likely to support a home team David, being "bullied" by Goliath IBM. But they have lost that "advantage", if it ever was realistic in the first place, as far as this copyright noninfringement counterclaim is concerned. Judges rule on declaratory judgment requests, if they agree to entertain them, not juries.

IBM Seeks Declaratory Judgment of Noninfringement | 352 comments | **Create New Account**

Oldest First ▾   Threaded ▾   Refresh   Reply

Comments belong to whoever posts them. Please notify us of inappropriate comments.

Delaware

Authored by: **overshoot** on Tuesday, March 30 2004 @ 07:03 PM EST

Well, it's not like IBM can wait for the DE Court to wake up 20 years later and
rule on Red Hat v. SCO

[**Reply to This** | **#**]

- **Delaware** - Authored by: **grouch** on Tuesday, March 30 2004 @ 07:54 PM EST
  - **Delaware** - Authored by: Anonymous on Tuesday, March 30 2004 @ 10:23 PM EST
    - **Delaware** - Authored by: **jmc** on Wednesday, March 31 2004 @ 03:34 AM EST
    - **Delaware** - Authored by: **bb5ch39t** on Wednesday, March 31 2004 @ 12:36 PM EST
      - **Delaware** - Authored by: Anonymous on Wednesday, March 31 2004 @ 12:49 PM EST
      - **OT: Tolls on Interstates** - Authored by: **markhb** on Wednesday, March 31 2004 @ 02:25 PM EST
  - **Delaware Closed** - Authored by: **chrisbrown** on Wednesday, March 31 2004 @ 12:55 AM EST
    - **Delaware Closed** - Authored by: Anonymous on Wednesday, March 31 2004 @ 02:51 AM EST
      - **Delaware Closed** - Authored by: Anonymous on Wednesday, March 31 2004 @ 07:42 AM EST
        - **Delaware Closed** - Authored by: **darkonc** on Thursday, April 01 2004 @ 04:44 AM EST
    - **Oh Canada** - Authored by: **bete noire** on Wednesday, March 31 2004 @ 08:35 AM EST
      - **Oh Canada** - Authored by: Anonymous on Wednesday, March 31 2004 @ 05:24 PM EST
- **Delaware** - Authored by: Anonymous on Tuesday, March 30 2004 @ 08:02 PM EST
- **Laziness** - Authored by: Anonymous on Tuesday, March 30 2004 @ 09:12 PM EST
  - **Laziness** - Authored by: Anonymous on Tuesday, March 30 2004 @ 09:59 PM EST
    - **Laziness** - Authored by: **pscottdv** on Tuesday, March 30 2004 @ 11:01 PM EST
      - **Laziness** - Authored by: Anonymous on Tuesday, March 30 2004 @ 11:19 PM EST
        - **Guilty!** - Authored by: **pscottdv** on Tuesday, March 30 2004 @ 11:36 PM EST
          - **Guilty!** - Authored by: **darkonc** on Thursday, April 01 2004 @ 08:00 AM EST
      - **Not Laziness At All** - Authored by: Anonymous on Wednesday, March 31 2004 @ 02:14 AM EST
  - **Please show respect for the Judge** - Authored by: Anonymous on Wednesday, March 31 2004 @ 08:52 AM EST
    - **Please show respect for the Judge** - Authored by: Anonymous on Wednesday, March 31 2004 @ 06:21 PM EST
  - **Wisdom is not laziness** - Authored by: **AllParadox** on Wednesday, March 31 2004 @ 12:29 PM EST
- **Actually Delaware courts are famous for speediness** - Authored by: **jayfar** on Tuesday, March 30 2004 @ 09:36 PM EST
  - **Corporate HQs** - Authored by: **bete noire** on Wednesday, March 31 2004 @ 08:23 AM EST
    - **Corporate HQs** - Authored by: Anonymous on Wednesday, March 31 2004 @ 05:24 PM EST
- **DEMONSTRATE NOW....** - Authored by: Anonymous on Tuesday, March 30 2004 @ 10:19 PM EST
  - **DEMONSTRATE NOW....** - Authored by: **greybeard** on Tuesday, March 30 2004 @ 10:53 PM EST

IBM Seeks Declaratory Judgment

Authored by: Anonymous on Tuesday, March 30 2004 @ 07:06 PM EST

Methinks the other shoe is dropping…on SCO!

[**Reply to This** | **#**]

- **IBM Seeks Declaratory Judgment** - Authored by: **icebarron** on Tuesday, March 30 2004